NG KUAN YEW & ANOR v. ABDUL RAZAK BAZHEER AHMAD & ANOR

HIGH COURT MALAYA, PULAU PINANG
AZMI ABDULLAH JC
[CIVIL APPEAL NO: PA-12B-46-05-2016]
25 NOVEMBER 2017

ROAD TRAFFIC: *Accident – Liability – Apportionment of – Sessions Court Judge apportioned 80% liability to first defendant and 20% liability to first plaintiff – Element of contributory negligence on first plaintiff's part – Failure to take evasive action from being collided into by first defendant -– Whether there was misdirection of fact and law in apportionment of liability*

DAMAGES: *General damages – Personal injuries – Award – First plaintiff suffered multiple injuries in road traffic accident – Whether Sessions Court Judge made award without any misappreciation of facts and law – Careful consideration of principles – Whether superior courts ought to interfere with awards made*

DAMAGES: *Loss of earnings – Award – Claim for loss of earnings by first plaintiff who suffered injuries in road traffic accident – Whether required strict proof – Whether work permit regarded as proof of earnings – Non-attendance of first plaintiff's employer in court – Non-confirmation of whether first plaintiff was employed – Documents produced in court to prove plaintiff's employment could not be converted to exhibits – Applicability of s. 73A of Evidence Act 1950 – Whether documents could be relied upon by court – Whether award of loss of earnings ought to be reversed*

The first plaintiff claimed that he was astride a motorcycle, together with a pillion rider, along Jalan Thean Teik when a motorcar driven by the first defendant from the opposite direction of a double-lined road suddenly encroached into his path of way without giving any signals. Due to the close proximity at the time of encroachment, the motorcar collided into him, causing him to crash. The first defendant, however, submitted that upon arriving at Jalan Thean Teik, with the road being packed with vehicles, the first plaintiff's motorcycle suddenly came from the opposite direction and crashed into the first defendant's motorcar. The Sessions Court Judge ('the SCJ'), after hearing all the evidence adduced at trial, apportioned liability at 80% on the first defendant with 20% being imposed on the first plaintiff. For general damages, the SCJ decided for the plaintiff (i) open fracture dislocation (RM25,000); (ii) amputation of right little finger (RM17,000); (iii) closed fracture (RM5,000); (iv) split skin grafting (RM10,000); (v) arthritis (RM8,000) and (v) scars (RM10,000). For loss of earnings, the SCJ awarded the sum of RM41,160 and did not make an award

for future loss of earnings. The defendant thus appealed on the issue of liability and quantum while the plaintiff cross-appealed also on the issue of liability and quantum.

Held (dismissing defendant's appeal and plaintiff's cross appeal on liability; reversing award for loss of earnings granted by Sessions Court to plaintiff):

(1) The SCJ had apportioned 20% liability on the first plaintiff due to there being an element of contributory negligence for his failure to take evasive action to avoid from being collided into by the first defendant upon realising that there was encroachment from the opposite direction by the first defendant's motorcar. The first plaintiff was riding in the inner lane with the road bending to the right. A vehicle manoeuvring a right bend tended to cut corners veering more to the right of its path of way. The first plaintiff could have completely avoided being collided into if he was truly in the inner lane and even with the vehicle encroaching into his path of way, there was ample time and space for him to make an evasive action. There was no misdirection of fact and law in the apportionment of liability at 20% against the plaintiff. (paras 13, 15 & 16)

(2) As for the general damages awarded, this court was fully convinced and satisfied that the SCJ had made the awards without any misappreciation of facts and law and this court in exercising its appellate jurisdiction upon a careful consideration of the principles enunciated by the superior courts decided not to interfere with the awards made. (para 24)

(3) Claims involving earnings should require strict proof. The production of minimal evidence and purely oral evidence without any form of corroboration should not be easily entertained. This court did not regard the first plaintiff's work permit as proof of earnings as it only showcased that the first plaintiff could be employed in Singapore. There would have to be actual proof of work and earnings before the court could be persuaded to make an award for loss of earnings. The first plaintiff's employer from Singapore was not called to confirm that the first plaintiff was employed with the eatery. It must be strictly proven by the plaintiff of the inability to secure his attendance in court to give evidence. There had been no such proof presented at trial hence the documents pertaining to earnings introduced through the first plaintiff remaining as ID documents until the completion of trial, was warranted. (paras 27, 29 & 32)

(4) The plaintiff's argument that, under s. 73A of the Evidence Act 1950, loss of earnings could still be awarded to the first plaintiff as his employer was in Singapore, thus fulfilling the requirement for the

non-attendance at trial was misconceived. In such instances stated under the cited section, documents could be accepted as exhibits if the court was satisfied, by invoking s. 73A of the Evidence Act 1950. However in the appeal before this court, the documents remained as ID documents until the end of trial without them being converted to exhibits utilising the use of s. 73A of the Evidence Act 1950. By remaining as ID documents, they did not qualify to be part of the evidence to be relied upon by the court. Hence, for the SCJ to make an award based on these documents was plainly wrong. To allow ID documents to be considered was to accept a lowering of the standard of proof that would lead to an opening of floodgates leading to further inconsistences that would not be curable in the future. Thus, this court reversed the award of RM41,160 granted to the first plaintiff dismissing the claim for loss earnings. This court also maintained the decision of the SCJ in dismissing the claim for loss of earning capacity and partial loss of future earnings as being unproven. (paras 30, 33, 36 & 37)

Case(s) referred to:

Allied Bank (Malaysia) Bhd v. Yau Jiok Hua [1998] 2 CLJ 33 HC ***(refd)***

Hang Jong Juan v. Tan Yeo Soon [1985] 1 CLJ 394; [1985] CLJ (Rep) 845 CA ***(refd)***

Inas Faiqah Mohd Helmi (A child suing through her father and next friend; Mohd Helmi Abdul Aziz) v. Kerajaan Malaysia & Ors [2016] 2 CLJ 885 FC ***(refd)***

Ken Property Sdn Bhd v. Badan Pengurusan Bersama Ken Damansara II Condomimnium [2016] 1 LNS 309 CA ***(refd)***

Leng Yang Sua & Anor v. Ng Yen Kee & Anor [1986] 1 CLJ 338; [1986] CLJ (Rep) 448 HC ***(refd)***

Mat Shah Mohamed & Anor v. Foo Say Meng & Ors [1983] 2 CLJ 194; [1983] CLJ (Rep) 254 FC ***(refd)***

Rasidin Partorjo v. Frederick Kiai [1976] 1 LNS 123 FC ***(refd)***

Sivalingam Periasamy v. Periasamy & Anor [1996] 4 CLJ 545 CA ***(refd)***

Tan Cheong Poh & Anor v. Teoh Ah Keow [1996] 3 CLJ 665 CA ***(refd)***

Tan Kuan Yau v. Suhindrimani Angasamy [1985] 1 CLJ 429; [1985] CLJ (Rep) 323 FC ***(refd)***

Topaiwah v. Salleh [1968] 1 LNS 161 FC ***(refd)***

United Plywood And Sawmill Ltd v. Lock Ngan Loi [1970] 1 LNS 164 FC ***(refd)***

Legislation referred to:

Evidence Act 1950, s. 73A

For the appellant/defendant - Hema Malini S Kolandasamy; M/s K Suganthi & Company

For the respondent/plaintiff - Joshua Narendran; M/s Ajmer Sandhu & Ong

[Editor's note: Appeal from Sessions Court; Summons No: A53KJ-92-12-2013 (overruled in part).]

Reported by Suhainah Wahiduddin

A

JUDGMENT

Azmi Abdullah JC:

Introduction

B **[1]** For purposes of this appeal, the parties will be referred to as they were at the Sessions Court level. The appeal by the defendant before this court is on the issue of liability and quantum with the plaintiff cross-appealing also on the issue of liability and quantum.

C **[2]** The learned Sessions Court Judge attributed liability at 80% on the first defendant with the first plaintiff being held 20% contributorily liable. For general damages, it was decided as below as regards the first plaintiff:

(i) open fracture dislocation right elbow with radial nerve cut extensor muscle cut - RM25,000

(ii) amputation of right little finger from fifth metacarpal level - RM17,000

D

(iii) closed fracture fifth metacarpal - RM5,000

(iv) split skin grafting - RM10,000

(v) arthritis - RM8,000

E (vi) scars - RM10,000

For earnings, the learned Sessions Court Judge awarded the sum of RM41,160 and did not make an award for loss of future earnings.

F **[3]** This court on 20 September 2017, after perusing the written submissions of both counsel and further oral clarifications, decided to dismiss the appeal and cross appeal on liability. For quantum, this court in exercising its appellate jurisdiction maintained the awards on general damages and reversed the findings by the learned Sessions Court Judge on loss of earnings granted to the plaintiff hence setting aside the award of RM41,160.

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[4] Aggrieved by the findings of this court on liability and quantum, now only the plaintiff has filed a notice of appeal to the court of appeal hence these grounds for decision.

Facts Of The Case

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[5] As is quite the norm in accident cases, there are differing versions as to how the accident occurred. The first plaintiff's version is that he was astride motorcycle Honda Wave 100 bearing registration No. PGN 4770 together with a pillion rider named Mohd Firdaus bin Shahabudeen on the way to town along Jalan Thean Teik when motorcar No. PCA 6451 from the opposite direction of a double lined road suddenly encroached into his path of way without giving any signals and due to the close proximity at the time of encroachment, the motorcar collided into him causing him to crash.

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[6] The first defendant's version is that upon arriving at Jalan Thean Teik driving motorcar No. PCA 6451 with the road being packed with vehicles, suddenly a motorcycle with plate No. PGN 4770 coming from the opposite direction crashed into his motorcycle.

Governing Principles

[7] This court would like to revisit the principles of appeals before delving further into the main issues of this appeal. The case of *Rasidin Partorjo v. Frederick Kiai* [1976] 1 LNS 123; [1976] 2 MLJ 214 has had the Federal Court observing that:

> A court of appeal always starts with the working presumption that any decision appealed against is right in every aspect. So to succeed in an appeal the appellant must convince us that the decision appealed from is wrong. If we are not so convinced, the appeal fails.

[8] The Federal Court in the precedent of *Mat Shah Mohamed & Anor v. Foo Say Meng & Ors* [1983] 2 CLJ 194; [1983] CLJ (Rep) 254; [1984] 1 MLJ 237 has stated:

> The learned Judge in this case had the advantage of seeing and hearing the witnesses which opportunity the appellate court did not enjoy and there was no reason in this case for the appellate court to interfere in the case.

[9] The Court of Appeal case of *Sivalingam Periasamy v. Periasamy & Anor* [1996] 4 CLJ 545; [1995] 3 MLJ 395 has enunciated that:

> It is trite law that an appellate court will not readily interfere with the findings of fact arrived by the trial court to which the law entrusts the primary task of evaluation of the evidence.

[10] It is apparent from these cases that the court in exercising its appellate jurisdiction should exercise restraint from interfering against the decisions of the court of first instance as the trial judges would have the benefit of seeing the conduct and demeanour of witnesses whilst giving evidence and especially when faced with being interrogated by counsel during cross-examination. There must be very substantive misdirection of facts and law before it would give merit to any such interference from the court sitting on appeal.

Deliberations Of The High Court On Liability

[11] The learned Sessions Court Judge after hearing all the evidence adduced at trial apportioned liability at 80% on the first defendant with 20% being imposed on the first plaintiff. This court has upheld the decision and since this appeal is now by the plaintiff to the Court of Appeal, the clarification is hereby as regards the liability of the first plaintiff which is at 20%.

[12] In the grounds of judgment it was stated by the learned Sessions Court Judge pertaining to the plaintiff, which is reproduced below in its original language:

> Namun begitu Mahkamah jugs mendapati bahawa terdapatnya cuai sumbangan oleh Plaintif Pertama di atas kemalangan yang berlaku yang menyumbang kepada berlakunya kemalangan. Di mana Mahkamah turut mendapati bahawa Plaintif Pertama telah gagal mengambil langkah-langkah yang perlu untuk membelok kearah kiri atau kanan jalan bagi mengelakkan daripada dilanggar motorkar Defendan Pertama apabila menyedari motorkar Defendan Pertama memasuki laluannya dan seterusnya menuju kearahnya.

[13] In essence, though it is accepted that the plaintiff's version is more probable, the learned Sessions Court Judge has apportioned 20% liability on the first plaintiff due to there being an element of contributory negligence for his failure to take evasive action to avoid from being collided into by the first defendant upon realising that there was encroachment from the opposite direction by the first defendant's motorcar.

[14] Looking at the sketch plan found at p. 395 of the record of appeal, it is gathered from evidence adduced that the first plaintiff was riding his motorcycle from the bottom of the sketch plan marked as P4 and the first defendant was coming from the opposite direction. The road was a two lane road of each side.

[15] The first plaintiff was riding in the inner lane with the road bending to the right. This court is convinced that a vehicle manoeuvring a right bend tends to cut corners veering more to the right of its path of way. Thus this court agrees with the learned Sessions Court Judge that the first plaintiff could have completely avoided being collided into if he was truly in the inner lane and even with the vehicle encroaching into his path of way, there was ample time and space for him to make an evasive action.

[16] Upon this consideration and the principle that the trial judge would be the best at analysing the demeanour of the witness upon seeing and hearing the evidence at trial especially under cross examination, this court does not find that there has been any misdirection of fact and law in the apportionment of liability at 20% against the plaintiff.

Deliberations On Quantum

General Damages

[17] The damages awarded in this appeal are as below:

(i) Complete amputation of the right little finger at the metacarpal level The learned Sessions Court Judge made an award of RM17,000 whereas the plaintiff before this court submits the figure of RM30,000 as the appropriate award.

(ii) Open fracture dislocation of right elbow with radial nerve cut and extensor muscle cut.

The plaintiff submits that the appropriate award should be RM50,000. with the learned Sessions Court Judge awarding RM25,000.

(iii) Muscle wasting

The award is RM5,000 with the plaintiff being dissatisfied and submitting the sum of RM10,000.

(iv) Multiple scars

The plaintiff argues that RM25,000 should be granted whereas the learned Sessions Court Judge has awarded RM10,000

(v) Skin grafting

The award is RM10,000 and the plaintiff submits that the award is low with the suitable award should be RM20,000

[18] The law is clear when it comes to determining damages as decided in *Inas Faiqah Mohd Helmi (A child suing through her father and next friend; Mohd Helmi Abdul Aziz) v. Kerajaan Malaysia & Ors* [2016] 2 CLJ 885, the Federal Court decided:

> It is trite that damages serve as compensation, not reward, less still a punishment (see *Ong Ah Long v. Dr S Underwood* (1983) 2 CLJ 198). In assessing damages, the court should not be motivated by sympathy and award fair compensation based on cogent evidence.

[19] The principles for overturning awards on quantum are numerous. In the case of *Rasidin Partorjo v. Frederick Kiai* [1976] 1 LNS 123; [1976] 2 MLJ 214, the Federal Court has observed that:

> On an appeal against the damages awarded, the appellant had to convince the appellate court that the learned trial judge had acted on a wrong principle of law or had misapprehended the facts or had for other reasons made a wholly erroneous estimate of the damage suffered.

[20] In the case of *Tan Cheong Poh & Anor v. Teoh Ah Keow* [1996] 3 CLJ 665; [1995] 3 MLJ 89 wherein it was held by the Court of Appeal and quoted that:

> It is trite that the appellate court should not give preference to its own figure simply because they disagree with the figure arrived at by the trial Judge; it will only interfere if it is satisfied that the Judge has acted on a wrong principle of law or has for other reasons made a wholly erroneous estimate of the damage suffered.

[21] In *Tan Kuan Yau v. Suhindrimani Angasamy* [1985] 1 CLJ 429; [1985] CLJ (Rep) 323 wherein it was held by the Federal Court that:

> The principle that should guide this Court in determining whether it should interfere with the quantum of damages is crystal clear. What is also clear is that much depends on the circumstances of each case in particular the amount of the award. In a particular case therefore it is for the appeal court to consider whether in the light of the circumstances of that case there is an erroneous estimate of the amount of the damage in that, either there was an omission on the part of the Judge to consider some relevant materials, or he had admitted for purpose of assessment some irrelevant considerations. If the Court is satisfied or convinced that the Judge has acted upon wrong principles of law it is justified in reversing; indeed, it is its duty to reverse the finding of the trial Judge.

[22] In *Topaiwah v. Salleh* [1968] 1 LNS 161; [1968] 1 MLJ 284 wherein it was held by the Federal Court that:

> In order to justify reversing the trial judge on the question of the amount of damages it will generally be necessary that this court should be convinced either that the judge acted on some wrong principle of law, or that the amount awarded was so extremely high or so very small as to make it an entirely erroneous estimate of the damages to which the plaintiff is entitled. The assessments which the courts have made over the years form some guide to the kind of figure which is proper and which the Federal Court will follow in the light of the special facts of each particular case.

[23] In the case of *United Plywood And Sawmill Ltd v. Lock Ngan Loi* [1970] 1 LNS 164; [1970] 2 MLJ 237 it was decided by the Federal Court:

> An appellate court can only interfere with an assessment if it is considered inordinately low or inordinately high or if it is so much out of line with the discernible pattern of awards in reasonably comparable case that it might be regarded as a wholly erroneous estimate.

[24] This court is fully convinced and satisfied that the learned Sessions Court Judge has made the awards without any misappreciation of facts and law and this court in exercising its appellate jurisdiction upon a careful consideration of the principles enunciated by the superior courts decides not to interfere with the awards made.

Earnings

[25] This court hereby addresses the issue of loss of earnings whereby the court decided to reverse the award of RM41,160 granted by the learned Sessions Court Judge to the plaintiff. These are the relevant facts pertaining to the earnings claim:

(i) The employer from Habib Ali Indian Food LLP Singapore was not called to confirm that the first plaintiff was employed with the eatery.

(ii) The first plaintiff's employer's letter remained as ID14 until the end of trial.

(iii) The first plaintiff's salary voucher was marked as ID15 during trial and remained so until the completion of the trial.

(iv) ID14 is dated 15 April 2012 whereas the accident occurred only on 18 April 2012.

(v) The pay-slip marked as ID15 bears no letterhead of the first plaintiff's employer.

(vi) The work permit of the first plaintiff is produced in court and marked as P13.

[26] This court has taken into consideration the case of *Leng Yang Sua & Anor v. Ng Yen Kee & Anor* [1986] 1 CLJ 338; [1986] CLJ (Rep) 448 before deciding:

> A claim for special damages must be strictly proved. Where the best evidence available has been produced, the court will do the best it can to make some award. But where evidence is or ought to be available and is not produced, the Court should be not be left to speculate what would be an appropriate sum to award. Since the first plaintiff did not keep accounts of his purchases and sales, his profits or wages paid to his employees and his tax returns, no award was made for loss of earnings.

[27] This very court has expressed in a previous decision, the view, that claims such as this should require strict proof. The courts especially at the Magistrate and Sessions court level where most of the accident matters are litigated should warn itself from being too lenient in dictating that claims involving earnings would require adequate documentary proof and should not shy away from demanding as such. The production of minimal evidence and purely oral evidence without any form of corroboration should not be easily entertained. It is the responsibility of the courts to ask parties to adhere closely to the strict proof rule and the courts should not be too readily persuaded especially by the element of sympathy to give unsubstantiated awards for earnings loss.

[28] The Court of Appeal in *Hang Jong Juan v. Tan Yeo Soon* [1985] 1 CLJ 394; [1985] CLJ (Rep) 845; [1986] 2 MLJ 5 it was held:

> In an appeal against the quantum of damages, it is settled law that the onus on the appellant is a heavy one and it must be established plainly that the trial judge's award was a wholly erroneous estimate.

[29] This court does not regard the work permit as proof of earnings. The work permit only showcases that the first plaintiff can be employed in Singapore but there would have to be actual proof of work and earnings before the court can be persuaded to make an award for loss of earnings.

[30] What is apparent from the record of appeal is that the documents pertaining to earnings introduced through the first plaintiff himself, remained as ID documents, until the completion of trial. The plaintiff solicitor argued that, under s. 73A of the Evidence Act 1950, by stressing on the phrase "if he is beyond the seas and it is not reasonably practicable to procure his attendance" loss of earnings could still be awarded to the first plaintiff as his employer was in Singapore thus fulfilling the requirement for the non-attendance at trial. This court finds this argument misconceived as this court finds that in such instances stated under the cited section, documents can be accepted as exhibits marked P if the court is satisfied, by invoking s. 73A of the Evidence Act 1950. However, in the appeal before this court the documents remained as ID documents until the end of trial without them being converted to exhibits marked P utilising the use of s. 73A of the Evidence Act 1950.

[31] The use of s. 73A of the Evidence Act 1950 was thoroughly discussed by Augustine Paul JC (as he then was) in *Allied Bank (Malaysia) Bhd v. Yau Jiok Hua* [1998] 2 CLJ 33; [1998] 6 MLJ 1 at pp. 55 & 66 (CLJ); pp. 21, 22 (MLJ) as well as 31. It was held that the conditions being:

(a) The statement must have been made in a document;

(b) The original document must be produced;

(c) The document in question forms part of a record purporting to be a continuous record (in so far as the matter dealt with thereby are not within his personal knowledge) and was made in the performance of a duty to record information supplied to the maker by a person who had, or might reasonably be supposed to have had, personal knowledge of those matters;

(d) The statement must not have been made by a person interested at a time when proceedings were pending or anticipated, involving a dispute as to any fact which the statement might tend to establish; and

(e) The maker of the statement must be dead, or unfit by reason of his bodily or mental condition to attend as a witness, or if he is beyond the seas and it is not reasonably practicable to secure his attendance, or if all reasonable efforts to find him have been made without success.

The language of s 73A requires all the conditions enumerated above to be satisfied.

At page 31 it was stated:

> That is the provision to s. 73A(1) which dispenses with the condition that the maker of the statement shall be called as a witness subject to fulfillment of the requirements stipulated therein. The proof of matters such as reasonable practicability to ensure the attendance of a witness who is beyond the seas, inability to find and

identify witnesses with reasonable diligence are not mere formalities but depends on concrete evidence; the burden of proof of such matters is on the tendering party.

[32] Hence, clearly the use of the section is only to be derived at, not by the mere fact that the employer in this case is based in Singapore, but it must be strictly proven by the plaintiff of the inability to secure his attendance in court to give evidence. This court finds that there has been no such proof presented at trial hence the documents remaining as ID documents is warranted.

[33] By remaining as ID documents they do not qualify to be part of the evidence to be relied upon by the court hence for the learned Sessions Court Judge to make an award based on these documents is plain wrong. The plaintiff produced a precedent whereby an award was made based on ID documents but it was a Sessions Court decision definitely not binding upon this court.

[34] The Court of Appeal in *Ken Property Sdn Bhd v. Badan Pengurusan Bersama Ken Damansara II Condomimnium* [2016] 1 LNS 309; [2016] MLJU 1629 deliberated on the use of documents marked as ID:

(3) Since the veracity or the truth of the contents of ID-3 and ID-4 could not be tested in court by the process of cross-examination, they remained as self-serving documents where no weight or probative value could or should be attached thereto: see *Ng Chooi Kor v. lsyoda (M) Sdn Bhd* [2010] 3 CLJ 162.

[35] To allow ID documents to be considered is to accept a lowering of the standard of proof that will lead to an opening of floodgates leading to further inconsistencies that wouldn't be curable in the future. The fact that ID 14 is dated before the accident date ie, 15 April 2012 whilst the accident occurred on 18 April 2012 taints the credibility of the document produced before the court.

[36] Based on these aforementioned considerations, this court decides to reverse the award of RM41,160 granted to the first plaintiff dismissing the claim for loss of earnings. At the same time this court also maintains the decision of the learned Sessions Court Judge in dismissing the claim for loss of earning capacity and partial loss of future earnings as being unproven.

Conclusion

[37] This court after revisiting the evidence adduced in the case before the learned Sessions Court Judge decides to interfere only with the decision of the learned Sessions Court Judge in awarding the sum of RM41,160 as loss of earnings to the first plaintiff thus reversing the award and dismissing the claim. The rest of the appeal and cross appeal on liability and quantum are dismissed.